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In the Supreme Court of the United States

OCTOBER TERM, 1969

No. 1065

ALLEN LEVAIR JORDAN and
ALVINA LAJAN JOHNSON,
Petitioners,

vs.

UNITED STATES OF AMERICA,
Respondent.

Petition for Writ of Certiorari to the Court of Appeals for the Ninth Circuit

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In the Supreme Court of the United States

OCTOBER TERM, 1969

No. .....

ALLEN LEVAIR JORDAN and
ALVINA LAJAN JOHNSON,
Petitioners,

vs.

UNITED STATES OF AMERICA,
Respondent.

Petition for Writ of Certiorari to the Court of Appeals for the Ninth Circuit

A writ of certiorari is respectfully sought to review the judgment of the U.S. Court of Appeals for the Ninth Circuit denying review of a warrantless house search by reason of the concurrent sentence doctrine enunciated in *Hirabayashi v United States,* 320 U.S. page 105 (1943).

OPINION AND ORDERS BELOW

The opinion of the Court of Appeals is reported at 416 Fed2d 338 (1969), appears in the Clerk's Transcript on Appeal and, pursuant to Rule 23(i) of the Rules of this Court, is appended hereto as Appendix "A". Appendix "B" is the judgment of the Court of Appeals and Appendix

"C" is the Order denying petitioner's petition for rehearing and rejection of suggestion for rehearing en banc.

JURISDICTION

The judgment sought to be reviewed was made and entered on September 15, 1969.

On November 14, 1969, the Court of Appeals denied a Rehearing and stayed issuance of the mandate pursuant to Rule 41(a), Federal Rules of Appellate Procedure. On December 19, 1969 Mr. Justice Douglas made and entered an order extending until January 14, 1970, the time within which this petition may be filed.

The jurisdiction of this Court is invoked by 28 USC 1254(1). U.S. Sup. Ct. Rule 19(b), 28 USCA.

QUESTIONS PRESENTED FOR REVIEW

1. Whether the concurrent sentence doctrine enunciated in *Hirabayashi v. United States,* 320 US 105 is applicable to a case on direct review in the light of *Benton v Maryland,* 395 US 784, 787-791, and *Sibron v New York,* 392 US 40, 50-58?

2. Whether limiting instructions are any more effective to protect Fourth Amendment rights than they were in *Bruton v United States,* 391 US 123, to protect Sixth Amendment rights?

3. Is the presumption concerning knowledge of illegal importation of narcotic drugs contained in *21 USC 174* which permits a trial for what Congress could have enacted rather than for what the defendant is charged, and overturns the reasonable doubt requirement, constitutionally viable?

4. Does the legislative nexus between importation and possession in *21 USC 174* with the concomitant compulsion upon the defendant to explain his possession infringe upon

Fifth Amendment right against self-incrimination within *United States v Jackson*, 390 US 570?

5. Whether the built-in presumption contained in Section 174 infringes the Self-Incriminatory Clause of the Fifth Amendment because the jury may draw the statutory inference *unless* the accused explains the possession to the satisfaction of the jury is a *pro tanto* overruling of *Griffin v California*, 380 US 609?

6. Is the presumption in *26 USC 4705(a)* that an accused deals in stamped drugs in the absence of a written order form constitutional in the light of *Tot v United States* (319 US 463), *Romano v United States* (392 US 136) and *Leary v United States* (395 US 6)?

7. Whether entry into and search of a house can be justified as lawful on the basis of consent when that "consent" has been given only after the official conducting the search has asserted that he possesses an arrest warrant? Is *Chimel v California* 395 US 752 applicable as being governed by the rule of prospective application as set forth in *Linkletter v Walker* 381 US 16?

STATUTES INVOLVED

21 USC 174: "* * * Whenever on trial for a violation of this section the defendant is shown to have or to have had possession of the narcotic drug, such possession shall be deemed sufficient evidence to authorize conviction unless the defendant explains the possession to the satisfaction of the jury."

26 USC 4705(a) makes it unlawful to sell narcotic drugs unless the purchaser furnishes "* * * a written order * * * on a form issued in blank for that purpose by the Secretary or his delegate."

STATEMENT OF THE CASE

The arrest of petitioners followed a warrantless entry and warrantless search of their home. Federal narcotics

agents, armed with a stale arrest warrant naming *James* Jordan, arrested *James* in downtown Los Angeles under color of the arrest warrant and took him to the federal courthouse. *James* Jordan convinced the agents that he was not guilty. Without obtaining any other warrant, the agents loaded him into an official car bound for Inglewood[1] where they staked out petitioner Allen Jordan's house and home. It is admitted that the arrest warrant was altered by agent Krueger who drew a line through "James" on the face of the warrant and inserted "Allen" thereon in longhand. Petitioner Johnson drove up to the house, alighted from her car, where an agent approached her in the front yard and asked her, "Are you Lajan?"[2] When she replied affirmatively, the agents placed her under arrest and gained entry by taking her inside the house where they waited until Allen arrived. Upon his arrival, Allen discovered the agents with drawn guns inside the house. Agent Krueger testified that Allen refused to give him permission to search his residence. The evidence in support of Jordan's conviction on counts X and XI was seized as a result of a subsequent search of a closet.[3] The Court of Appeals reversed Count XI under *Leary, infra,* but refused to consider at all the validity of the verdict on count X, "because of the concurrent sentence on six other counts", citing *Hirabayashi, infra,* at page 105. In its opinion, the Ninth Circuit adopted the theory of the dissent in *Benton v. Maryland,* 395 US 784.

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1. A suburban residential area about 15 miles distant.
2. At the trial she was positively identified by the agent who presumably could not identify her at the time of arrest by the wording of the greeting.
3. The court of appeals refused to invalidate the search, holding *Chimel v. California,* 395 US 752 would be inapplicable regardless of the fact that this case has not become final on appeal. 416 F2d 348.

At the conclusion of the Government's case, the trial court acquitted petitioner Johnson as to counts X and XI. She was also accused in counts VII, VIII and IX with transporting, facilitating a sale, and selling heroin on June 15, 1967, by William Jackson, then a federal narcotics agent, who claimed she was the driver of an automobile and said that she was accompanied by one Thomas Small who did not appear at the trial. Petitioner Johnson vigorously disputed the identification by the former narcotics agent in the purported transaction.

At the time of trial, Jackson's service with the government had been terminated.

Former agent Jackson also accused petitioner Jordan with having transported *(Sec. 174)*, having facilitated a sale *(Sec. 174)*, and of a sale of heroin without a proper form *(IRC Sec. 4705(a))*, on April 24, 1967, in counts I, II and III, claiming that Jordan had accompanied the absent Small in an automobile, all of which was vigorously disputed.

The ex-agent likewise accused petitioner Jordan with transporting (Sec. 174), facilitating a sale (Sec. 174), and of selling heroin without a proper form (IRC Sec. 4705(a)), on April 28, 1967, in counts IV, V, and VI, Jackson again claiming that Jordan and the non-testifying Small were together in an automobile, which was likewise strenuously resisted by Jordan to no avail.

And, even though the trial judge expressed grave doubt about petitioner Johnson's complicity at all, suggesting a "Wrong Election" by the prosecutor as to remaining counts against Johnson (VII, VIII and IX), the jury was allowed to consider, absorb, and correlate (1) evidence seized in the warrantless search of the house embraced in count XI reversed by the Court of Appeals; (2) other evidence seized in the warrantless search of the house embraced in count

X not reversed by reason of the concurrent sentence doctrine; and (3) six other counts, not directly involving petitioner Johnson, but implicating Jordan with the same ex-agent and the same absent Thomas Small on two other occasions in two similarly alleged transactions. (1) and (2) also included testimony by another agent against objection that petitioner Jordan refused to give him permission to search their residence. This inadmissible testimony coupled with the numerous Government witnesses who testified about the illegal search and its products and the specific items embraced in counts X and XI seized in petitioner Johnson's residence and enhanced by the now illegal jury instruction in terms of Section 176a, are now said by the Court of Appeals (416 Fed 2d p. 344) to be non-prejudicial because of the trial court's remark to the jury that "no inference of guilt may be drawn from anyone exercising their rights under the Constitution", and within the *Chapman* (386 US 18) concept of harmless error. Again alluding to the so-called concurrent sentence doctrine, the Court of Appeals held (416 Fed 2d at p. 346) that the product of the warrantless house search not covered by *Leary* (395 US 6), albeit illegal, will not be considered *at all,* by reason of the continuing vitality of *Hirabayashi v United States,* 320 US 81, 105, and *in spite of Benton v Maryland,* 395, 784, 787-791. See 416 Fed2d at p. 346.

BASIS OF FEDERAL JURISDICTION IN THE UNITED STATES DISTRICT COURT

(i.e. The court of first instance)

The district court's jurisdiction was conferred by 18 USC 3231.

Pretrial and mid-trial motions to suppress were argued at length and denied; motions to sever parties and causes were heard and renewed during trial; appropriate objec-

tions to evidence and testimony all appear in the record; and motions for judgment of acquittal were considered and granted in part only. The questions were again raised in a motion for a new trial, and in petitioners' briefs to the Court of Appeals, and their Petition for Rehearing therein, plus Suggestion for En Banc Hearing.

REASONS COMPELLING ALLOWANCE OF THE WRIT

1. This Is a Proper Case to Apply This Court's Holding in Benton v Maryland, 395 US 784 on Direct Review.

1. The Court of Appeals has squarely rejected *Benton v Maryland,* 395 US 784, and *Sibron v New York,* 392 US 40, that a stronger case for total abolition of the concurrent sentence doctrine may well be made on direct appeal, and instead found it "unnecessary" under *Hirabayashi,* 320 US 81, 105, which was the very case under consideration for overruling when *Benton* was restored to this Court's calendar last term and reargued. As pointed out in Benton, the *St. Pierre decision* (319 US 41) implied that the defendant had the burden of establishing the existence of "collateral legal consequences" resulting from conviction. This burden was shifted in *Pollard v. United States,* 352 US 354, where the Court presumed that collateral legal consequences existed as a result of a conviction that for one reason or another had become apparently moot when presented for review. The Court, at page 358 said:

> "The possibility of consequences collateral to the imposition of sentence is sufficiently substantial to justify our dealing with the merits."

Recently, this Court reviewed the "mootness" issue in *Sibron v New York,* 392 US 40. Referring to its decision on mootness in *Pollard,* supra, *Fiswick v United States,* 329 US 211, and *United States v. Morgan,* 346 US 502, the Court said:

> "The Court thus acknowledged the obvious fact of life that most criminal convictions do in fact entail adverse collateral legal consequences. The mere 'possibility' that this will be the case is enough to preserve a criminal case from ending 'ignominiously in the limbo of mootness'." (392 US 55)

There is no cogent reason why the Court's philosophy on mootness should be less applicable to concurrent sentences than it is to sentences of imprisonment already served at the time of review. Myriad collateral legal consequences, many of them unpredictable, can affect defendants in either case.

For example, under count X, Jordan's unreviewable conviction for concealment of heroin and cocaine on July 27, 1967, rests on tainted evidence derived from a warrantless search of his home. The Court of Appeals adoption of *Hirabayashi* deprived Jordan anew of his Fourth Amendment rights. Since it is three months removed from the other two transactions reflected in counts I-VI, surely it would be separately counted against him at a future trial. Although petitioner Jordan could explain that the Court of Appeals specifically refused to review a Fourth Amendment violation because of the so-called concurrent sentence doctrine on direct appeal, a jury might not be able to appreciate this sublety. Although this possibility may well be a remote one, it is enough to give this case an adversary cast and make it justiciable. Moreover, enhanced sentences for prior infractions of narcotics laws are counted separately when three months apart, and should he be unfortunate and convicted again with three previous convictions, he may never live outside prison walls again. Is there, in these circumstances, a live "case" or "controversy" suitable for resolution by this Court; or, is the issue moot?

The Court of Appeals adoption of *Hirabayashi* in this case on direct appeal overlooked footnote 11 in *Benton:*

> "A stronger case for total abolition of the concurrent sentence doctrine may well be made in cases on direct appeal, as compared to convictions attacked collaterally by suits for postconviction relief."

Added to this should be the inadmissible testimony and exhibits seized in the warrantless house search which by far were the most direct and probative evidence of the decisive elements of dominion and control in an associational context. The other evidence was circumstantial, uncorroborated and far from overwhelming. The risk that the jury might have taken into consideration the tainted evidence of counts X and XI is too great to allow this judgment to stand.

2. Limiting Instructions Aren't Necessarily Any More Effective to Protect Fourth Amendment Rights Than They Were in Bruton v United States, 391 US 123, to Protect Sixth Amendment Rights.

It is quite possible that the jury was unable to disregard the tainted evidence (Counts X and XI), or to separate it from the untainted evidence of guilt, which was itself very slim.

The disinclination to presume that curative instructions are truly effective is nothing new. The same distrust was expressed in *Throckmorton v Holt,* 180 US 552, 567 (1901).

The Government's witnesses testified about the warrantless house search and their direct testimony pertained to the challenged search and its products. At the close of the Government's case, the District Judge acquitted petitioner Johnson of counts X and XI, and advised the jury to disregard the exhibits seized and all evidence of the attendant circumstances.

However, the admissible evidence remaining against petitioner Johnson was so weak and the evidence of the warrantless house search first admitted against her and later withdrawn from the jury's consideration was so strong, that there is a strong probability that the jury did not follow the judge's instructions. Add to this the impact upon the jury of six other counts, not directly implicating Johnson, but implicating Jordan with the same ex-agent and the same absent Thomas Small on two other occasions in two similarly alleged transactions, plus the impact of the reversed count (XI) as to petitioner Jordan. The Court of Appeals relies on supposedly curative instructions and finds no room for *Bruton.* (416 Fed2d at p. 344)

Like *Bruton,* 391 US 123, and *Burgett v Texas,* 389 US 109, this is a criminal case and it is the accused who must pay the price if the jury has failed to follow its instructions. The limiting instruction following petitioner Johnson's acquittal on counts X and XI came three days (and more than three hundred transcript pages) after the jury had first heard the evidence part of which was ruled inadmissible by the Court of Appeals (Count XI) also as to petitioner Jordan. This afforded the opportunity to absorb it and to correlate it with the evidence lawfully admitted, although both appellants raised the question of admissibility early in the trial. Cf. *Throckmorton v Holt,* 180 US 552, 567 (1901).

On these facts, it would surely seem that the cost of a new trial weighs less in the scales of justice than the possibility of an improperly obtained verdict of guilty. The risk that the jury might have taken into consideration the inadmissible testimony and exhibits in counts X and XI, all of which was derived from a warrantless house search, is too great to allow the convictions to stand.

3. A Presumption Is Arbitrary When Congress Accords the Basic Fact an Evidential Effect That Exceeds the Fact's Natural Probative Value.

If Congress said proof of fact X is some evidence of fact Y, but in truth, fact X is irrelevant to Y, the statute would be unconstitutional. Similarly, if Congress declares proof of fact X establishes prima facie, crime Y, and if the judiciary disagrees with the conclusion, the provision would be unconstitutional. These observations are borne out by *Gainey v. United States,* 380 US 63 and *Romano,* supra. In the former, the Court upheld a *presumption* [Sec. 5601(b)(3), Int.Rev.Code of 1954, 26 USC 5601(b)(3)] which provides that presence of a person at an illegal distilling operation is sufficient evidence to authorize conviction for carrying on or being engaged in the operation. Proof of the exact fact—presence at the site of an illegal still [Sec. 5601(b)(4), Int.Rev.Code of 1954 26 USC 5601(b)(4)]—was deemed constitutionally insufficient in *Romano* to authorize conviction for possession, custody, or control of an unregistered still. Presence, however, is relevant to establishing possession, custody, or control (383 US at p. 141). The critical distinction between the two cases lies in the nature of the crimes involved. The *Gainey* Court noted that the crime of carrying on an illegal still operation is very broad, and encompasses anyone who aids and abets in any way (380 US at p. 67). Therefore, Congress had accorded the fact of presence its natural, probative force because illegal distilling operations work clandestinely, and only employees are normally allowed on the premises (380 US at pp. 67-68). On the other hand, the crime alleged in *Romano* has been defined narrowly, and includes only those who had custody or possession, or those who directly facilitated custody or control—e.g., a caretaker (382 US at pp. 139-141). Prior to *Romano,* the courts

had uniformly held presence to be insufficient evidence to authorize a conviction for possession of a still,[4] and, therefore, Congress acted unconstitutionally in attempting to accord the basic fact more than its natural probative value.

Bearing in mind the principles of procedural due process regularly applied to criminal prosecutions that each defendant is entitled to a fair trail with all of the fundamental guarantees, one of these guarantees is the obligation of the prosecution to prove the alleged crime beyond a reasonable doubt. "This notion—basic in our law and rightly one of the boasts of a free society—is a requirement and safeguard of due process of law" (*Leland v Oregon,* 343 US 790, 803 (1952), dissenting opinion). It is founded upon the recognition that witnesses may and often do err in their recollections, and on the fundamental belief that criminal penalties are so harsh that they should not be imposed unless the defendant's guilt is a near certainty.

A *presumption* that provides, for example, that proof of the basic fact is sufficient evidence to authorize a conviction, but is irrational, allows the jury to convict on insufficient evidence. Such a provision is unconstitutional because it conflicts with the reasonable doubt standard, and injects caprice into the trial by directing the court to treat something as true which might well be contrary to the actual facts. It is also tantamount to trying a man for a crime with which he is *not* charged—e.g., in *Romano* the defendant was tried for *presence* rather than *possession.* The *Leary* Court's interpretation of the rational connection standard falls short and suggests a "more likely than not" rule which is germane to civil proceedings and invoked inappropri-

4. In *U.S. v Bozza,* 330 US 160 (1946) it was held that presence alone was insufficient evidence to convict for possession. Presence is relevant to possession, but tells nothing about the accused's particular function.

ately to measure the legality of a presumption that authorizes the jury to find a crime or an element of that crime *beyond a reasonable doubt*. The civil test of sufficiency should not apply in criminal cases because there could be instances in which evidence would support a finding by a preponderance and not beyond a reasonable doubt. In such a situation, *Leary* would permit a conviction. This is indefensible—the reasonable doubt concept rests on sound, time-tested policies and should not be overturned. Since a footnote in the opinion[5] indicates that the problem remains somewhat open, the Court should take the next opportunity to modify and limit the *Leary* view of rational connection.

The Court in *Leary* favored the "more likely than not" test and rejected the so-called "greater includes the lesser standard". Both, however, qualify for the same criticism. The "greater includes the lesser" theory has received considerable support and was first put forth by Justice Holmes in *Ferry v Ramsey*, 277 US 88 (1928), a civil case. There, under a state statute, bank directors who permitted the bank to accept deposits with knowledge of the bank's insolvency were liable to the depositors. A statutory presumption allowed the trier of fact to infer basic knowledge of insolvency from acceptance of deposits. Here, the basic fact has little or no relevance to the presumed fact. Nevertheless, the provision was upheld on the grounds that it was within the power of the state to impose strict liability, and that the challenged statute imposed only a lesser liability. The Solicitor General advanced this "greater includes the lesser" theory in support of the presumption in *Tot*, *Romano* and *Leary*. In each case, the Court replied that the constitutionality of a presumption is tested by what Congress enacts and not by what it may hypothetically enact. Un-

5. See fn. 64 in *Leary*.

doubtedly the Court's conclusions are valid. The danger of the "greater includes the lesser" theory is that in some cases it will overturn the reasonable doubt requirement and will permit a trial for what Congress could have enacted rather than that which the defendant is charged. For example if a defendant is charged with the crime of transporting a firearm, and a *presumption* makes *possession* prima facie evidence of transportation, the provision is irrational if it permits the jury to convict for possession and not the alleged crime, and the defendant would not have had a real opportunity to defend. The presumption of knowledge of illegal importation of narcotic drugs in 21 USC 174 makes *possession* prima facie evidence of importation, and the provision is irrational as permitting the jury to convict for possession and not the alleged crime, thus permitting a trial for what Congress could have enacted rather than for what the defendant is charged, and overturning the reasonable doubt requirement.

4-5. The Legislative Nexus Between the Fact of Possession and Importation with the Concomitant Compulsion Upon Defendant Under 21 USC 174 to Explain His Possession Infringes the Self-Incriminatory Clause of the Fifth Amendment Within United States v Jackson, 390 US 570.

If the jury may draw the statutory inference *unless* the accused explains the possession to their satisfaction, such is a protanto overruling of *Griffin v California,* 380 US 609. See also *People v Licavoli,* 250 N.W. 520 (Mich. 1933). *Jackson and Griffin* were fully argued in juxtaposition to Section 174 in *Turner v United States,* #190 O.T. 1969, on November 15, 1969, and for sake of brevity will not be repeated here.

6. The Built-in Presumption in 26 USC 4705(a) That the Absence of Appropriate Tax-Paid Stamps from Any Drugs Shall Be Prima Facie Evidence of a Violation of This Section by the Person in Whose Possession the Same May Be Found, Assumes That Possession by a Person of Unstamped Drugs Is Prima Facie Evidence of the Fact That He Deals in Stamped Drugs, and Is a Wholly Illogical and Irrational Presumption Which Is So Unreasonable as to Be a Purely Arbitrary Mandate.

The drugs said to be the subject of the sales in the case at bench were neither in nor from original stamped packages. Sales purportedly to ex-agent Jackson is the sole evidence relied upon by the Government to show that petitioners were dealers. *The fact that one possesses unstamped drugs, instead of indicating that he deals in stamped drugs, indicates just the opposite.* Congress could not lawfully enact a law where possession of unstamped narcotic drugs is prima facie evidence of a violation of this penal provision of the Internal Revenue Code, therefore, the trial court should have granted the motion for judgment of acquittal on the so-called tax counts.

The *presumption* that a possessor of unstamped drugs is a dealer in stamped drugs plus requiring a tax form which is impossible to obtain clearly shows that Congress has enacted *presumptions* to accomplish ends that could be more easily attained by passage of ordinary statutes.[6] This unnatural inference is not unlike the one where presence in a car transported across state lines knowing it to be stolen is prima facie evidence of the crime of aiding and abetting the forbidden transportation. See *Baker v U.S.*, 395 Fed2d 368 (8th Cir. 1968) in which the court held the evidence insufficient to sustain the conviction.

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6. Heroin is not manufactured, sold, prescribed or used legally within the United States. Therefor, it is *impossible* in law to comply with IRC 4705(a), 26 USC 4705(a). See 21 USC 174.

7. There Can Be No Consent After the Official Conducting the Search Has Asserted That He Possesses a Warrant.

When a prosecutor seeks to rely upon consent to justify the lawfulness of a search, he has the burden of proving that the consent was in fact, freely and voluntarily given. *Bumper v North Carolina,* 391 US 542. This burden cannot be discharged by showing no more than acquiescence to a claim of lawful authority. *Johnson v United States,* 333 US 10. *A search conducted in reliance upon a warrant cannot later be justified on the basis of consent. Bumper,* supra, *United States v Elliott,* 210 F.Supp. 357, 360. When a law enforcement officer claims authority to search a home under a warrant, he announces in effect that the occupant has no right to resist the search. The situation is instinct with coercion—albeit colorably lawful coercion. Where there is coercion there cannot be consent. Petitioner Johnson's acquiescence was not consent and it was constitutional error to admit the evidence seized in the house under both counts X and XI.

Presumably, since the Court of Appeals did not rule on the illegality of the search as to Count X, the ruling of the trial court that it was as stated heretofore, lawful still stands. The 9th Circuit stated that if *Chimel v California,* 395 US 752, were to be applied retroactively, the search of petitioners' residence would be illegal but refused to make any such finding in that regard. (416 F2d 448) It is submitted that the search was illegal regardless of *Chimel.* However, *Chimel* should be applicable to all cases presently pending on direct review. See *Linkletter v Walker,* 381 US 16, where the court formed such a rule of prospective application in another 4th Amendment "exclusionary" case, i.e. *Mapp v Ohio,* 367 US 643.

CONCLUSION

For any or all of the reasons, stated the petition for certiorari should be allowed.

Respectfully submitted,

EDWARD L. CRAGEN
San Francisco,
For Petitioners

Appendix A

United States Court of Appeals
for the Ninth Circuit

No. 22,668

ALLEN LEVAIR JORDAN AND ALVINA LAJAN JOHNSON,

Appellants,

vs.

UNITED STATES OF AMERICA,

Appellee.

[September 15, 1969]

Appeal from the United States District Court
for the Central District of California

Before: BARNES and MERRILL, Circuit Judges, and TAYLOR*, District Judge:

TAYLOR, District Judge:

The appellant Jordan has appealed from a judgment convicting him on five counts of violating Title 21 U.S.C. § 174[1], convicting him on two counts of violating Title 26

*Honorable Fred M. Taylor, United States District Judge, District of Idaho, sitting by designation.

1. Insofar as here relevant 21 U.S.C. § 174 provides:

"Whoever fraudulently or knowingly imports or brings any narcotic drug into the United States or any territory under its control or jurisdiction, contrary to law, or receives, conceals, buys, sells, or in any manner facilitates the transportation, concealment, or sale of any such narcotic drug after being imported or brought in, knowing the same to have been imported or brought into the United States contrary to law, or conspires to commit any of such acts in violation of the laws of the United States, shall be imprisoned. . . .

"Whenever on trial for a violation of this section the defendant is shown to have or to have had possession of the narcotic drug, such possession shall be deemed sufficient evidence to authorize conviction unless the defendant explains the possession to the satisfaction of the jury."

U.S.C. § 4705(a)[2], and convicting him on one count of violating Title 21 U.S.C. § 176a[3]. Appellant Johnson has appealed from a judgment convicting her on two counts of violating Title 21 U.S.C. § 174, and convicting her on one count of violating Title 26 U.S.C. § 4705(a). Each of the appellants was sentenced to serve a term of imprisonment of five years on each count, the sentences to run concurrently. The appellants were tried jointly and have filed a joint brief on this appeal which sets forth several specifications of error.

The indictment on which appellants were tried contained eleven counts. Counts I and IV charged appellant Jordan and one Thomas Small, who did not appear or testify at the trial, with knowingly and unlawfully receiving, concealing and facilitating the concealment and transportation of heroin in violation of 21 U.S.C. § 174. The violation charged

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2. 26 U.S.C. § 4705(a):
"General requirement.—It shall be unlawful for any person to sell, barter, exchange, or give away narcotic drugs except in pursuance of a written order of the person to whom such article is sold, bartered, exchanged, or given, on a form to be issued in blank for that purpose by the Secretary or his delegate."

3. 21 U.S.C. § 176a:
"Notwithstanding any other provision of law, whoever, knowingly, with intent to defraud the United States, imports or brings into the United States marihuana contrary to law, or smuggles or clandestinely introduces into the United States marihuana which should have been invoiced, or receives, conceals, buys, sells, or in any manner facilitates the transportation, concealment, or sale of such marihuana after being imported or brought in, knowing the same to have been imported or brought into the United States contrary to law, or whoever conspires to do any of the foregoing acts, shall be imprisoned.

. . .

"Whenever on trial for a violation of this subsection, the defendant is shown to have or to have had the marihuana in his possession, such possession shall be deemed sufficient evidence to authorize conviction unless the defendant explains his possession to the satisfaction of the jury."

in count I was alleged to have occurred on or about April 24, 1967, and the violation charged in count IV was alleged to have occurred on or about April 28, 1967.

Counts II and V charged appellant Jordan and said Small with having, knowingly and unlawfully sold heroin to agent William Jackson of the Federal Bureau of Narcotics, on the same two occasions, knowing such heroin to have been imported into the United States, contrary to 21 U.S.C. § 174.

Jordan and said Small were charged in counts III and VI with knowingly and unlawfully selling heroin to agent Jackson on the same two occasions without obtaining from Jackson a written order on a form issued for that purpose by the Secretary of the Treasury, contrary to 26 U.S.C. § 4705(a).

Appellant Johnson and said Small were charged in Count VII with knowingly and unlawfully receiving, concealing and facilitating the concealment and transportation of heroin, a narcotic drug, on June 15, 1967, well knowing it had been imported, contrary to 21 U.S.C. § 174.

Count VIII charged Johnson and Small with having on the same date, June 15, 1967, knowingly and unlawfully sold and facilitated the sale of heroin to agent Jackson knowing it had been imported, in violation of 21 U.S.C. § 174.

Count IX charged Johnson and said Small with knowingly and unlawfully selling heroin, a narcotic drug, on June 15, 1967, to agent Jackson without obtaining from him a written order on a form issued for that purpose, contrary to 26 U.S.C. § 4705(a).

Appellants Jordan and Johnson were jointly charged in count X with knowingly concealing, receiving and facilitating concealment and transportation of heroin and co-

caine on July 27, 1967, knowing said drugs to have been imported, contrary to 21 U.S.C. § 174.

Count XI charged appellants with intent to defraud the United States, having on July 27, 1967, knowingly received, concealed and facilitated the transportation and concealment of marijuana (marihuana) which they well knew had been imported, contrary to 21 U.S.C. § 176a.

Appellant Jordan was convicted on all counts in which he was charged and appellant Johnson was convicted on counts VII, VIII and IX. The court granted a motion for a judgment of acquittal on counts X and XI as to appellant Johnson.

The record reveals that on two separate occasions, April 24 and April 28, 1967, appellant Jordan and the above mentioned Thomas Small sold heroin, a narcotic drug, to agent Jackson of the Federal Bureau of Narcotics, one of the officers who arrested appellants on July 27, 1967. It also appears that appellant Johnson and said Small sold heroin to agent Jackson on June 15, 1967.

The conviction of appellant Jordan on each of counts I, II and III was based on the transaction of April 24, 1967; his conviction on each of counts IV, V, and VI was based on the transaction of April 28, 1967, and his conviction on each of counts X and XI was the result of the search of his residence and seizure of evidence as a result thereof on July 27, 1967.

The conviction of appellant Johnson on each of counts VII, VIII and IX rose out of the transaction on June 15, 1967.

The assignments of error raised by the appellants in regard to that part of Title 21 U.S.C. § 174 which provides that a defendant's possession of a narcotic drug shall be deemed sufficient evidence that the narcotic drug was

illegally imported into the United States, and that the defendant knew of the illegal importation, unless the defendant explains his possession to the satisfaction of the jury, and the like provision pertaining to marijuana contained in Title 21 U.S.C. § 176a, will be considered together.

In light of the recent Supreme Court decision in *Leary v. United States,* ..... *U.S.* ....., 89 S.Ct. 1532 (May 19, 1969), the conviction of appellant Jordan on count XI which charged him with a violation of 21 U.S.C. § 176a cannot be upheld. Said count charged Jordan with knowingly receiving and concealing 1,018.95 grams of marijuana which he knew had been imported into the United States contrary to law. The Government relied on the presumption of knowledge aspect of § 176a to prove that the marijuana was illegally imported into the United States in order to obtain the conviction of Jordan on count XI. In *Leary* the court said at 1556:

> "We conclude that the 'knowledge' aspect of the § 176a presumption cannot be upheld without making serious incisions into the teachings of *Tot, Gainey,* and *Romano.* In the context of this part of the statute, those teachings require that it be determined with substantial assurance that at least a majority of marijuana possessors have learned of the foreign origin of their marijuana through one or more of the ways discussed above."

The holding in the *Leary* decision may give some cause to challenge the constitutionality of the "knowledge" aspect of 21 U.S.C. § 174 presumption. However, the Supreme Court specifically stated that it was not considering that problem. In Footnote 92 of its opinion the court stated:

> "In refusing to follow this aspect of the reasoning in *Yee Hem,* we intimate no opinion whatever about the continued validity of the presumption relating to

'hard' narcotics, which was sustained in *Yee Hem* and is now found in 21 U.S.C. § 174. As will appear, our holding that the § 176a 'knowledge' presumption is unconstitutional rests entirely upon a detailed inquiry into the available facts about the state of mind of marijuana users. The facts regarding 'hard' narcotics may well be significantly different."

Until the Supreme Court holds otherwise we shall adhere to the prior decisions of this court which have held the presumption concerning knowledge of illegal importation of narcotic drugs contained in § 174 is constitutional. See *Verdugo v. United States,* 402 F.2d 599, 604 (9 Cir. 1968); *Morgan v. United States,* 391 F.2d 237, (9 Cir. 1968); *Nutter v. United States* ..... F.2d ..... (No. 22,758, 9 Cir., decided May 29, 1969).

Appellants further contend that their conviction for violating 26 U.S.C. § 4705(a) should be set aside on the theory that this section violates their right against self-incrimination protected by the Fifth Amendment to the Constitution. In support of this contention the appellants rely on the cases of *Marchetti v. United States,* 390 U.S. 39, 88 S.Ct. 697 (1968); *Grosso v. United States,* 390 U.S. 62, 88 S.Ct. 709 (1968); *Haynes v. United States,* 390 U.S. 85, 88 S.Ct. 722 (1969). Title 26 U.S.C. § 4705(a) makes it unlawful to sell narcotic drugs unless the purchaser furnishes "a written order . . . on a form . . . issued in blank for that purpose by the Secretary or his delegate."

The United States Court of Appeals for the 2nd Circuit considered the constitutionality of 26 U.S.C. § 4705(a) in light of *Marchetti, Grosso* and *Haynes,* in the case of *United States v. Minor,* 398 F.2d 511 (1968). The issue before the court in that case was:

"[W]hether the Fifth Amendment privilege against self-incrimination affords a defense to a prosecution

for selling narcotic drugs without the mandatory written order form required by 26 U.S.C. § 4705(a)." Id. at 512.

In resolving said question the court concluded that compliance with § 4705(a) did not subject Minor to the risk of self-incrimination. In so deciding the court found the issue they considered was significantly different from those before the Supreme Court in *Marchetti, Grosso* and *Haynes*. Id. at 514. The issues raised in the Minor case in regard to the constitutionality of Section 4705(a) were identical to those raised by appellants in this cause.[4]

Appellants also urge that they were denied due process of law because of the lapse of time between the sales of heroin and their arrest. As heretofore stated, the appellant Jordan sold heroin to agent Jackson on two separate occasions, the first being April 24, 1967, and the second on

4. In *Minor* at pp. 513, 514 and 515 the court stated:

"Considered in *vacuo*, compliance with § 4705(a) does not present any threat of self-incrimination. . . . The statutory language makes manifest—and Minor concedes—that the purchaser of narcotics and not the seller is under compulsion to apply for and obtain the requisite order form. . . .

"Minor maintains, (as do appellants) however, that § 4705(a) must be examined in the context of the entire statutory and regulatory scheme and that when so viewed the potential for incrimination becomes apparent.

. . .

"Nevertheless, we are of the view that the issue we are called upon to resolve is significantly different from those before the Supreme Court in *Marchetti, Grosso* and *Haynes* and we conclude that Minor's conviction must be affirmed because compliance with § 4705(a) would not have subjected him to the risk of self-incrimination. If § 4705(a) serves a distinct Congressional purpose and can be meaningfully enforced apart from the sections which allegedly pose the incrimination dilemma, it is incumbent upon us to consider it as an isolated enactment in order to avoid the adjudication of a serious constitutional issue. See, e.g., Ashwander v. Tennessee Valley Authority, 297 U.S. 288, 348, 56 S.Ct. 466, 80 L.Ed. 688 (1936) (concurring opinion of Mr. Justice

April 28, 1967, and the Indictment was returned and filed on August 16, 1967. Appellants argue that because of this time element they were prejudiced in the preparation and defense of their case. They claim that they could not recall the details of the days on which they were charged with selling narcotic drugs to agent Jackson. We find no merit in these contentions. There was only a delay of three months between the first sale by Jordan and the arrest of appellants. It is disclosed that agent Jackson positively identified the appellants as the individuals from whom he had purchased the narcotics. (R.T. pages 291-293; 298-307). The case of *Ross v. United States,* 349 F.2d 210 (1965) upon which appellants rely is not controlling in this case. In *Ross* there was a purposeful delay of seven months between the commission of the offense and the arrest. At the trial, the identification of Ross, as the seller of narcotics, was by a policeman who had to refresh his memory from a notebook. In the case of Woody v. United States, 370 F.2d 214 (1966) Judge Burger of the United States Court of Appeals for the District of Columbia in a dissenting opinion discussed the standards which *Ross* requires and stated at page 220:

> "The application of *Ross* to a particular case turns on three operative elements: (1) the *length* of the purposeful delay; (2) the *basis* of the identification of the defendant; and (3) the claimed *effect* of the delay in

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Brandeis), cited in Haynes v. United States, supra, 390 U.S. at 92, 88 S.Ct. at 722. . . . And, we believe that § 4705(a) serves an important function within the statutory scheme even if, which we do not decide, the seller cannot be forced to fill out the form and to keep it available for government inspection. Requiring that sales be made only to persons who have acquired and are able to produce Treasury forms ensures that narcotic drugs will not be transferred to unauthorized purchasers or to those who are likely to evade the payment of taxes imposed under 26 U.S.C. §§ 4701 and 4721." (Footnotes omitted.)

rebutting the identification, i.e., the resulting prejudice. It is the existence of a purposeful delay and a *Ross*-type identification that permits a lesser degree of prejudice to reverse; without those factors the narcotics defendant would be required to show substantial and specific prejudice. Thus; the shorter the period of delay or the better the method of identification, the greater the prejudice which must be shown.

"*Ross* recognized that there was a crucial need as well as a valid purpose for undercover narcotics investigations and that some purposeful delays between the offense and the arrest were inevitable." (Footnotes omitted.)

The only prejudice claimed by appellants is that they could not recall details of the days in the distant past but steadfastly maintained their innocence. The time element between the first sale of heroin by Jordan and the arrest of the appellants was not so unreasonable as to warrant a reversal of the conviction. There were no "special circumstances" in this case as there were in the cases of *Ross* and *Woody*, supra.

The appellants have not shown that the defense of either was prejudiced by the delay. Their defense was a denial that they had ever sold narcotics to anyone. Their testimony is that they could not remember 'the details of the days in the distant past." In the circumstances in this case and according to the recent decisions of this court, we hold that the delay in the arrest of either of the appellants did not result in the denial of due process. *Wilson v. United States*, 409 F.2d 184 (9 Cir. 1969); *Whitted v. United States*, ... F.2d ..... (No. 22,830, 9 Cir., decided May 5, 1969).

Appellants claim that a certain quantity of narcotic drugs must exist in order to support their conviction. They do not cite any federal authority in support of such claim

and we have found none. The Federal law only requires that some measurable amount of narcotic drug be contained in the substance which is the subject of the Indictment. *United States v. Wanton,* 380 F.2d 792, (2 Cir. 1967).

Appellants argue that the trial court erred in not granting each a separate trial. Their reliance on the two recent Supreme Court decisions of *Bruton v. United States,* 391 U.S. 123, 88 S.Ct. 1620 (1968); *Roberts v. Russel,* 392 U.S. 293, 88 S.Ct. 1921 (1968) is misplaced. Both of these cases involve the admission of a co-defendant's confession implicating the other defendant at a joint trial when the co-defendants did not take the stand and thus denied the defendant his right of cross-examination secured by the confrontation clause of the Sixth Amendment. In this case neither of the appellants was denied his or her right of confrontation because both appellants took the witness stand and neither made a statement implicating the other. In this case the conduct of appellants upon which each of the counts was based was part of a series of factually related transactions in which both of the appellants participated, and the counts were properly joined, even though each count alleged a separate offense and both of appellants were not charged in each count. *Williamson v. United States,* 310 F.2d 192 (9 Cir. 1962); *Wiley v. United States,* 277 F.2d 820 (4 Cir. 1960) certiorari denied 364 U.S. 816, 81 S.Ct. 47; Rule 8, F.R.Cr.P.

Appellants also contend that the trial court erred in refusing to grant a mistrial after agent Krueger testified that appellant Jordan refused to give him permission to search his residence. If the admission of said testimony did create any prejudice in the minds of the jurors, it was removed when the court admonished the jury that: "No inference of guilt may be drawn from anyone exercising their rights under the Constitution." (R.T. 406). We find

that the error, if any, was harmless. In *Clark v. United States,* ..... F.2d ..... (No. 23,032, 9 Cir., decided May 19, 1969), it was stated:

> "The critical question here is whether the error in the setting of this case can be deemed to be harmless. The Court in *Chapman v. California,* 386 U.S. 18 in holding that even constitutional errors can be harmless, stated at page 22: 'We conclude that there may be some constitutional errors which in the setting of a particular case are so unimportant and insignificant that they may, consistent with the Federal Constitution, be deemed harmless, not requiring the automatic reversal of the conviction.'"

We shall now consider appellants' contention that appellant Jordan was arrested under and pursuant to a warrant of arrest issued for his "look alike" brother, James C. Jordan and as a result his arrest was invalid. It is argued that the arrest being invalid the search made incident thereto was unreasonable and illegal and the evidence seized as a result thereof should have been suppressed. The Government concedes that the arrest of appellant Jordan in his house was not made under the authority of a valid warrant but was made on the basis that the agents had probable cause to believe appellant Jordan had committed a crime. It clearly appears that because of the sales of heroin to agent Jackson, the officers did have ample cause to believe and know that appellant Jordan had committed a crime and they could therefore arrest him without a warrant.

Although the officers had a warrant for the arrest of James Jordan and did arrest him they soon found out after talking to him that appellant Allen Jordan was the one they wanted to arrest. James Jordan told the agents where his brother resided and accompanied them to his brother's

home. Soon after arriving at the Allen Jordan home the agents arrested appellant Johnson outside the residence pursuant to a valid warrant of arrest. The evidence discloses and the trial court found that the officers entered the residence at the request of and with the permission of Johnson. When appellant Jordan arrived he was placed under arrest inside the house when both agents Jackson and Krueger were present. Jordan was identified by agent Jackson as being the individual from whom he had purchased narcotics and agent Krueger participated in the surveillance of the transactions.

The facts and circumstances known to the arresting officers were sufficient to constitute probable cause for the arrest of appellant Jordan. Agents of the Federal Bureau of Narcotics may arrest persons without a warrant when they have reasonable grounds to believe that the person arrested has committed or is committing a violation of the Federal Narcotics Law. 26 U.S.C. § 7607, *Rocha v. United States,* 387 F.2d 1019 (9 Cir. 1967); *Cf. Bell v. United States,* 371 F.2d 35 (9 Cir. 1967), cert. denied, 386 U.S. 1040, 87 S.Ct. 1498, 18 L.Ed.2d 608.

The principal reason that appellants question the legality of the arrest of appellant Jordan is to challenge the legality of the search of appellants' residence incident to such arrest. The evidence which supports Jordan's conviction on counts X and XI was seized as a result of the search of his residence made incident to his arrest and without a search warrant. The evidence was discovered by agent Krueger in a closet which was visible from where Jordan was seated but not in the immediate area or within his reach. In considering this question of the search and the seizure of the evidence used at the trial against Jordan on counts X and XI, we must not only look to the cases cited

by appellants and the Government but also to the recent decision of the Supreme Court of the United States in *Chimel v. State of California,* ..... U.S. ....., (No. 770, decided June 23, 1969). In *Chimel* the court stated:

> "*Rabinowitz* and *Harris* have been the subject of critical commentary for many years, and have been relied upon less and less in our own decisions. It is time, for the reasons we have stated, to hold that on their own facts, and insofar as the principles they stand for are inconsistent with those that we have endorsed today, they are no longer to be followed.
>
> "Application of sound Fourth Amendment principles to the facts of this case produces a clear result. The search here went far beyond the petitioner's person and the area from within which he might have obtained either a weapon or something that could have been used as evidence against him. There was no constitutional justification, in the absence of a search warrant, for extending the search beyond that area. The scope of the search was, therefore, 'unreasonable' under the Fourth and Fourteenth Amendments, and the petitioner's conviction cannot stand."

If the rule announced in *Chimel* is to be applied retroactively, then the search of appellants' residence would have been unreasonable and illegal. However, in an order of the Supreme Court made and entered on June 23, 1969, in the case of *Von Cleff v. New Jersey,* No. 837, 37 LW 3491, the court indicated some doubt as to whether *Chimel* would be given retroactive application. It stated as follows:

> "This challenge would unquestionably be well founded if today's decision in Chimel v. California, ante, p. ...., were given retroactive application." See also Shipley v. California, No. 540 Misc., 37 LW 3492.

Our resolution of this case does not require us to decide whether *Chimel* is to be applied retroactively and we do not do so.

Assuming, arguendo, that the search was illegal, the conviction of the appellant Jordan as a result thereof on Count X need not be considered because of the concurrent sentence on six other counts. While such sentences in no way deprive this court of jurisdiction to consider the validity of the verdict on Count X, *Benton v. Maryland,* 395 U.S. 784, 787-791 (1969) holds it is "unnecessary," under certain circumstances, and is a matter of our discretion, by reason of the continuing rule of judicial convenience. *Cf. Hirabayashi v. United States,* 320 U.S. 81, 105 (1943).

In our judgment, under the facts of this case, the establishment of appellant Jordan's guilt on six other counts of the indictment makes it unnecessary for us to decide whether the assessment of guilt on the seventh count (Count X) is valid.

After fully considering the record we conclude that there is substantial competent evidence to sustain the judgment convicting appellant Jordan on all counts except Counts X and XI and to sustain the judgment convicting appellant Johnson.

We AFFIRM the judgment of conviction as to appellant Jordan on all counts, except Count XI which we reverse; and Count X which we find unnecessary to consider; and we AFFIRM the judgment of conviction as to appellant Johnson.

Appendix B

JUDGMENT

United States Court of Appeals
for the Ninth Circuit

No. 22,668

ALLEN LEVAIR JORDAN AND ALVINA LAJAN JOHNSON,
Appellants,

vs.

UNITED STATES OF AMERICA,
Appellee.

APPEAL from the United States District Court for the Central District of California.

THIS CAUSE came to be heard on the Transcript of the Record from the United States District Court for the Central District of California and was duly submitted.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court, that the judgment of the said District Court in this Cause be, and hereby is affirmed as to appellant Jordan on all counts, except Count XI which we reverse; and Count X which we find unnecessary to consider; and we AFFIRM the judgment of conviction as to appellant Johnson.

Filed and entered SEP 15 1969

Appendix C

United States Court of Appeals for the Ninth Circuit

Excerpt from Proceedings of Friday, November 14th, 1969

Before: BARNES and MERRILL, Circuit Judges, and TAYLOR, District Judge

ORDER DENYING PETITION FOR REHEARING

On consideration thereof, and by direction of the Court, IT IS ORDERED that the petition of Appellants filed September 29, 1969 and within time allowed therefor by rule of court, for a rehearing of above cause be, and hereby is denied, and rejecting suggestion for rehearing en banc.